

is timely filed with the BALCA, the determination by the Center Director is suspended until the BALCA issues a determination on the employer's appeal. In any challenge to the wage determination, neither ETA nor the NPC shall divulge any employer wage data collected under the promise of confidentiality.

(i) Where an employer timely challenges an OFLC PWD obtained by the Administrator, the 30-day investigative period shall be suspended until the employer obtains a final ruling. Upon such a final ruling, the investigation and any subsequent enforcement proceeding shall continue, with the PWD as determined by the BALCA serving as the conclusive determination for all purposes.

(ii) [Reserved]

(3) For purposes of this paragraph (d), OFLC may consult with the NPC to ascertain the prevailing wage applicable under the circumstances of the particular complaint.

[65 FR 80214, Dec. 20, 2000, as amended at 66 FR 63302, Dec. 5, 2001; 69 FR 68228, Nov. 23, 2004; 69 FR 77384, Dec. 27, 2004; 71 FR 35521, June 21, 2006; 73 FR 19949, Apr. 11, 2008; 73 FR 78067, Dec. 19, 2008; 74 FR 45561, Sept. 3, 2009]

**§ 655.732 What is the second LCA requirement, regarding working conditions?**

An employer seeking to employ H-1B nonimmigrants in specialty occupations or as fashion models of distinguished merit and ability shall state on Form ETA 9035 or 9035E that the employment of H-1B nonimmigrants will not adversely affect the working conditions of workers similarly employed in the area of intended employment. For the purposes of this section, "H-1B" includes "E-3 and H-1B1" as well.

(a) *Establishing the working conditions requirement.* The second LCA requirement shall be satisfied when the employer affords working conditions to its H-1B nonimmigrant employees on the same basis and in accordance with the same criteria as it affords to its U.S. worker employees who are similarly employed, and without adverse effect upon the working conditions of such U.S. worker employees. Working conditions include matters such as hours, shifts, vacation periods, and

benefits such as seniority-based preferences for training programs and work schedules. The employer's obligation regarding working conditions shall extend for the longer of two periods: the validity period of the certified LCA, or the period during which the H-1B nonimmigrant(s) is(are) employed by the employer.

(b) *Documentation of the working condition statement.* In the event of an enforcement action pursuant to subpart I of this part, the employer shall produce documentation to show that it has afforded its H-1B nonimmigrant employees working conditions on the same basis and in accordance with the same criteria as it affords its U.S. worker employees who are similarly employed.

[65 FR 80221, Dec. 20, 2000, as amended at 66 FR 63302, Dec. 5, 2001; 73 FR 19949, Apr. 11, 2008]

**§ 655.733 What is the third LCA requirement, regarding strikes and lockouts?**

An employer seeking to employ H-1B nonimmigrants shall state on Form ETA 9035 or 9035E that there is not at that time a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment. A strike or lockout which occurs after the labor condition application is filed by the employer with DOL is covered by DHS regulations at 8 CFR 214.2(h)(17). For the purposes of this section, "H-1B" includes "E-3 and H-1B1" as well.

(a) *Establishing the no strike or lockout requirement.* The third labor condition application requirement shall be satisfied when the employer signs the labor condition application attesting that, as of the date the application is filed, the employer is not involved in a strike, lockout, or work stoppage in the course of a labor dispute in the occupational classification in the area of intended employment. Labor disputes for the purpose of this section relate only to those disputes involving employees of the employer working at the place of employment in the occupational classification named in the labor condition application. See also DHS regulations at 8 CFR 214.2(h)(17) for effects of strikes or lockouts in general on the H-1B nonimmigrant's employment.

(1) *Strike or lockout subsequent to certification of labor condition application.* In order to remain in compliance with the no strike or lockout labor condition statement, if a strike or lockout of workers in the same occupational classification as the H-1B nonimmigrant occurs at the place of employment during the validity of the labor condition application, the employer, within three days of the occurrence of the strike or lockout, shall submit to ETA, by U.S. mail, facsimile (FAX), or private carrier, written notice of the strike or lockout. Further, the employer shall not place, assign, lease, or otherwise contract out an H-1B nonimmigrant, during the entire period of the labor condition application's validity, to any place of employment where there is a strike or lockout in the course of a labor dispute in the same occupational classification as the H-1B nonimmigrant. Finally, the employer shall not use the labor condition application in support of any petition filings for H-1B nonimmigrants to work in such occupational classification at such place of employment until ETA determines that the strike or lockout has ended.

(2) *ETA notice to DHS.* Upon receiving from an employer a notice described in paragraph (a)(1) of this section, ETA shall examine the documentation, and may consult with the union at the employer's place of business or other appropriate entities. If ETA determines that the strike or lockout is covered under DHS's "Effect of strike" regulation for "H" visa holders, ETA shall certify to DHS, in the manner set forth in that regulation, that a strike or other labor dispute involving a work stoppage of workers in the same occupational classification as the H-1B nonimmigrant is in progress at the place of employment. See 8 CFR 214.2(h)(17).

(b) *Documentation of the third labor condition statement.* The employer need not develop nor maintain documentation to substantiate the statement referenced in paragraph (a) of this section. In the case of an investigation, however, the employer has the burden of proof to show that there was no strike or lockout in the course of a labor dispute for the occupational classification in which an H-1B non-

immigrant is employed, either at the time the application was filed or during the validity period of the LCA.

[59 FR 65659, 65676, Dec. 20, 1994 as amended at 66 FR 63302, Dec. 5, 2001; 73 FR 19949, Apr. 11, 2008]

**§ 655.734 What is the fourth LCA requirement, regarding notice?**

An employer seeking to employ H-1B nonimmigrants shall state on Form ETA 9035 or 9035E that the employer has provided notice of the filing of the labor condition application to the bargaining representative of the employer's employees in the occupational classification in which the H-1B nonimmigrants will be employed or are intended to be employed in the area of intended employment, or, if there is no such bargaining representative, has posted notice of filing in conspicuous locations in the employer's establishment(s) in the area of intended employment, in the manner described in this section. For the purposes of this section, "H-1B" includes "E-3 and H-1B1" as well.

(a) *Establishing the notice requirement.* The fourth labor condition application requirement shall be established when the conditions of paragraphs (a)(1) and (a)(2) of this section are met.

(1)(i) Where there is a collective bargaining representative for the occupational classification in which the H-1B nonimmigrants will be employed, on or within 30 days before the date the labor condition application is filed with ETA, the employer shall provide notice to the bargaining representative that a labor condition application is being, or will be, filed with ETA. The notice shall identify the number of H-1B nonimmigrants the employer is seeking to employ; the occupational classification in which the H-1B nonimmigrants will be employed; the wages offered; the period of employment; and the location(s) at which the H-1B nonimmigrants will be employed. Notice under this paragraph (a)(1)(i) shall include the following statement: "Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division of